

*These notes refer to the Enterprise Act 2002 (c.40)
which received Royal Assent on 7 November 2002*

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Mergers

Summary and Background

Chapter 4: Enforcement

223. Sections 71–95 and Schedules 7 and 8 set out the enforcement powers of the OFT, CC and Secretary of State before, during and after a merger reference. As in FTA 1973, enforcement takes two forms: undertakings and orders. Undertakings are given voluntarily by one or more of the parties to a merger. Once accepted by the relevant authority, these become legally binding and enforceable in the courts. Orders are made by the authorities and prohibit the parties specified in the order from doing something or specify that they must take certain action. Before and during a reference, undertakings and orders seek to prevent any action being taken that might prejudice the eventual outcome of the merger inquiry. Following the CC's final report, an undertaking or order may be used to remedy the adverse effects on competition identified by the report. In the case of final orders, what an order can specify is set out in Schedule 8. Under FTA 1973, orders were made by statutory instrument; the OFT and CC will now have the power to make orders on their own authority. There is a different but similar enforcement regime for those cases where the Secretary of State has intervened on public interest grounds. This is set out in Schedule 7.

Powers exercisable before references under section 22 or 33

Section 71: Initial undertakings: completed mergers

224. This section allows the OFT to accept undertakings from parties where it is considering whether to make a merger reference in relation to a completed merger. This is a new power for the OFT. It allows the OFT to act before it has reached a definite conclusion on whether to refer the merger. The OFT can ask parties to undertake not to carry out any action that might prejudice the merger reference or the ability of the CC to act following the outcome of its inquiry. These undertakings are legally-binding.

Section 72: Initial enforcement orders: completed mergers

225. This section permits the OFT to make an order where it is considering whether to make a merger reference. This is a new power for the OFT. The OFT is able to act before it has reached a definite conclusion on whether to refer a completed merger. The OFT can only make initial orders in respect of mergers that have been completed and where it has reason to believe that action is planned that could prejudice any subsequent investigation. This power is modelled on the interim order-making power in section 74 FTA 1973.

Section 73: Undertakings in lieu of references under section 22 or 33

226. This section allows the OFT to seek and accept undertakings from one or more parties to a merger in place of a reference. The purpose of accepting undertakings is to allow the OFT (where it is confident about the problem that needs to be addressed and the appropriate solution) to correct the competition problem the merger presents without recourse to a potentially time-consuming and costly investigation. This provision mirrors the existing power in section 75G FTA 1973 for the Secretary of State to accept undertakings-in-lieu, but with responsibility transferred to the OFT.

Section 74: Effect of undertakings under section 73

227. This section specifies that a reference on the same merger cannot be made if the OFT has accepted undertakings in lieu of a reference.

Section 75: Order-making power where undertakings under section 73 not fulfilled etc.

228. This section allows the OFT to make an order when an undertaking-in-lieu is not being complied with. In such circumstances, the OFT could seek to enforce the original undertaking in the courts or decide to replace it with an order. The content of such an order is limited to the matters set out in Schedule 8 (see below). This provision transfers the Secretary of State's existing powers in section 75K FTA 1973 to the OFT.

Section 76: Supplementary interim order-making power

229. This section is for use when an undertaking-in-lieu is not being fulfilled and the OFT would like to replace it with an order. It allows the OFT to act quickly to put in place an interim order while it prepares the main remedial order, including carrying out any consultation. The interim order can prevent the parties from taking any action that might prejudice the main order. This interim power is also available to the CC when they are considering replacing final undertakings with a final order.

Interim restrictions and powers

Section 77: Restrictions on certain dealings: completed mergers

230. This section applies an automatic prohibition on the parties to a completed merger, once it has been referred, to prevent them undertaking any further integration without the consent of the CC. This is a new provision, which applies only to completed mergers. It has been introduced because in almost all merger cases the authorities seek to prevent such further integration either by securing undertakings or by making an interim order.

Section 78: Restrictions on certain share dealings: anticipated mergers

231. This section applies an automatic prohibition on the parties to an anticipated merger to prevent them from acquiring any further shares in one another without the consent of the CC. This provision brings in the equivalent prohibition in section 75(4A) FTA 1973.

Section 79: Sections 77 and 78: further interpretation provisions

232. This section provides technical clarification on what constitutes an acquisition of an interest in shares for the purposes of section 78 and sets out certain common definitions for both sections.

Section 80: Interim undertakings

233. This section allows the CC to accept undertakings from one or more parties to a merger that they will not take any action that might prejudice the eventual outcome of the merger reference. This is a new provision. Section 74 FTA 1973 allowed for an interim

order (see below) to be made during the course of a reference but made no provision for accepting interim undertakings. In practice, undertakings have been sought and accepted during this period, but on a non-statutory basis. This provision makes such undertakings legally-binding.

Section 81: Interim orders

234. This section allows the CC to make an order to prevent the parties to a merger from taking any action that might prejudice the eventual outcome of the merger reference. This provision is modelled on section 74 FTA 1973. It applies after a merger has been referred. An interim order can be made in respect of both completed and anticipated mergers.

Final powers

Section 82: Final undertakings

235. This section allows the CC to accept final undertakings from the parties to remedy competition problems identified in its final report on a merger. This is based on the provisions on undertakings in section 88 FTA 1973.

Section 83: Order-making power where final undertakings not fulfilled

236. This section allows the CC to replace final undertakings with an order where the parties are not complying with the undertakings. Any order made under this section is limited to the matters set out in Schedule 8.

Section 84: Final orders

237. This section allows the CC to make an order to remedy any competition problem identified in its final report on a merger investigation. This final order may contain any of the matters set out in Schedule 8.

Schedule 8: Provision that may be contained in certain enforcement orders

238. This Schedule contains the list of matters that can be included in final orders for the purpose of remedying the adverse effects specified in the CC's report. This list is based on Schedule 8 of FTA 1973. It has been updated to reflect modern drafting conventions. Certain new remedies have also been added. These are remedies that experience has shown it would be useful to be able to call upon. The new remedies are as follows:

- paragraph 10 – the ability to require goods or services to be supplied to a particular standard or in a particular manner. This has been added to ensure that final orders can require parties to meet a certain quality of service or to continue to produce a certain range of goods. For example, it would allow an order to tell a bus company to maintain a certain frequency of service.
- paragraphs 13(3)(k) and 22 – these allow the OFT to approve the buyer of a divested business and also to approve other conduct or matters.
- paragraph 13(3)(l) – this allows for the appointment of a trustee to oversee the divestment of a business.
- paragraph 18 – the ability to specify how certain information should be published. This has been added to ensure that orders can specify that information should be published on the Internet.
- paragraph 19(c) – this allows the OFT to publish information that it is given.
- paragraph 20 – this allows for provision to be made in the interests of national security.

Public interest and special public interest cases

Section 85: Enforcement regime for public interest and special public interest cases

239. This section brings into effect the separate but similar enforcement regime for those cases when the Secretary of State has decided to intervene on public interest grounds. This regime is set out in detail in Schedule 7.

Schedule 7: Enforcement regime for public interest and special public interest cases

240. This Schedule sets out the enforcement regime that applies for cases involving a public interest consideration. The regime mirrors that of the main regime, giving the Secretary of State equivalent powers to the CC and OFT. It includes provisions for the Secretary of State to make pre-emptive orders or accept pre-emptive undertakings (paragraphs 1 and 2); these are the equivalent of initial and interim orders and undertakings. The Secretary of State may accept undertakings in place of making a reference (paragraphs 3, 4, 5). Schedule 7 includes provision equivalent to the supplementary interim order-making power set out in section 76 (paragraph 6) and the same automatic prohibitions as apply under sections 77 and 78 on further integration for completed mergers and on further share acquisition for anticipated mergers (paragraphs 7 and 8). Finally, the Schedule includes equivalent powers to accept final undertakings (paragraph 9) or make final orders (paragraph 10 and 11). Orders of the Secretary of State under Schedule 7 are made by way of statutory instrument and subject to the negative resolution procedure in Parliament (section 124(5)).

Undertakings and orders: general provisions

Section 86: Enforcement orders: general provisions

241. This section makes certain general provisions that apply to all orders.

Section 87: Delegated power of directions

242. This section allows the person making an order to give directions to an individual or to an office-holder in any company or association. Failure to comply with such directions may lead to action before the courts.

Section 88: Contents of certain enforcement orders

243. This section sets out the minimum contents of any final order or order to replace undertakings-in-lieu.

Section 89: Subject-matter of undertakings

244. This section makes clear that enforcement undertakings (which are legally enforceable) can make provision for matters that cannot be included in final orders. Thus, final undertakings differ from final orders in that the latter are limited to the matters included in Schedule 8.

Section 90: Procedural requirements for certain undertakings and orders

245. This section gives effect to Schedule 10, which sets out the procedural requirements to be followed in making or revoking an order and in accepting or releasing an undertaking.

Schedule 10: Procedural requirements for certain enforcement undertakings and orders

246. This Schedule sets out the consultation process for making, varying or revoking certain orders or undertakings. Paragraphs 1-5 set out the process to be followed in making

an order or accepting undertakings. Paragraphs 6-8 set out the process for revoking an order or releasing a party from an undertaking.

247. In both cases, the authorities will set out clearly what they are proposing to do and the reasons for it. The authorities will have to give notice of their intention to make or vary an order to the parties directly affected by it. There will be a thirty-day consultation period for orders and a fifteen-day period for undertakings, although the authorities can apply an accelerated procedure in merger cases in special circumstances (paragraph 9).
248. These procedural requirements apply to all orders and undertakings except initial and interim orders and undertakings. Initial and interim orders do not have to comply with these procedural requirements because they may need to be introduced at short notice.

Section 91: Register of undertakings and orders

249. This section creates a register to be maintained by the OFT of all orders and undertakings made or accepted by the OFT, CC or Secretary of State and of which it is aware. This register will be available to the public.

Enforcement functions of OFT

Section 92: Duty of OFT to monitor undertakings and orders

250. This section gives the OFT the lead role in monitoring undertakings and orders. The OFT will keep all undertakings and orders under review. Where it decides that an order or undertaking should be amended or revoked, it will advise the CC or Secretary of State accordingly. Where an order or undertaking is not being complied with, the OFT will be able to take the company to court. This is based on the monitoring role the DGFT currently has under section 88 FTA 1973.

Section 93: Further role of OFT in relation to undertakings and orders

251. This section allows the CC and the Secretary of State to ask the OFT to negotiate undertakings with the parties to a merger. The CC or (as the case may be) the Secretary of State retains the final say on whether undertakings should be accepted. The CC and the Secretary of State may also choose to negotiate directly with the parties.

Other

Section 94: Rights to enforce undertakings and orders

252. This section ensures that orders and undertakings can be enforced through the courts. Any person who sustains loss or damage as a result of the contravention of an order or undertaking may bring action before the courts. The OFT may bring civil proceedings to enforce compliance with orders or undertakings. The CC and Secretary of State may also bring civil proceedings in respect of orders or undertakings for which they are responsible.

Section 95: Rights to enforce statutory restrictions

253. This section ensures that compliance with the automatic prohibitions on further integration (section 77) and on further share acquisition (section 78) can be enforced through the courts.